

# DOCKET SECTION

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

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Postal Rate and Fee Changes, 1997

Docket No. R97-1  
POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

**NEWSPAPER ASSOCIATION OF AMERICA  
MOTION IN OPPOSITION TO ADMISSION INTO EVIDENCE  
OF CERTAIN LIBRARY REFERENCE MATERIALS AND  
SUPPLEMENTAL TESTIMONY USPS-ST-44  
October 16, 1997**

The Newspaper Association of America hereby respectfully moves, pursuant to Presiding Officer's Ruling No. R97-1/42,<sup>1</sup> to perfect its objection to the introduction into evidence of Library References 109 and 182 and the supplemental testimony of witness McGrane, as well as the portions of the testimony of witnesses Daniel and Moeller that rely on those materials. The admission of these materials into the record over 3 months after the Postal Service filed its case is contrary to the Commission's rules and should not be tolerated.

This issue has, of course, received considerable attention in this proceeding. The governing law is clear. Rule 53 of the Commission's rules of practice states unequivocally that "[s]imultaneously with the filing" of a formal request for a change in rates, the Postal Service "shall file *all* of the prepared direct evidence upon which it proposed to rely in the proceeding on the record . . . to establish that the proposed changes . . . are in the public interest" and comply with law. 39 C.F.R. § 3001.53 (emphasis added). It is also undisputed that unsponsored library references – the

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<sup>1</sup> *Presiding Officer's Ruling Concerning Witnesses Sponsoring Library References*, P.O. Ruling No. 97-1/42 (Oct. 10, 1997).

status of both LR-H-109 and LR-H-182, pending the supplemental testimony of Mr. McGrane -- are not evidence under the Commission's rules.<sup>2</sup> Accordingly, the Commission may rely upon them consistent with due process. *See Mail Order Association of America v. United States Postal Service*, 2 F.3d 408 (D.C. Cir. 1993).

At this time, NAA's motion is limited to LR-H-109 and LR-H-182, the Supplemental Testimony of witness McGrane, and the portions of the testimony of Ms. Daniel and Mr. Moeller that refer to or depend upon those materials. These two documents present new analyses that differ materially from those underlying current rates, that have not previously been the subject of record testimony in this or any other proceeding, and that are relied upon as support for proposed material changes in rate design.<sup>3</sup> These new cost analyses are readily distinguishable from data collections to which the "business records" exception to the hearsay rule may apply, and certainly are not materials of which the Commission properly may take official notice. As these unsponsored library references are not "evidence," they cannot support changes from current rates. While the Postal Service is certainly free to propose changes in rate

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<sup>2</sup> See Rule 31 ("Designation of a document as a library reference is a procedure for facilitating reference to the document in Commission proceedings and does not, by itself, confer any particular evidentiary status upon the document"); Special Rule 5, Presiding Officer Ruling R97-1/4, Attachment B (library reference material "is not evidence unless and until it is designated and sponsored by a witness").

<sup>3</sup> LR-H-109 (Standard Mail (A) Processing ECR Costs) presents, *inter alia*, separate cost estimates for walk-sequenced and non-walk-sequenced Standard (A) Enhanced Carrier Route letter and non-letter mail, which are reported by Ms. Daniel (USPS-T-29 at Ex. 29D), and used by Mr. Moeller in his rate design. LR-H-182 (Standard Mail (A) Unit Cost By Weight Increment) contains a purported "cost study" cited by Mr. Moeller as support for his proposed reduction of the pound rate in Standard (A) Mail.

design, rule 53 requires that it do so on the basis of record evidence filed as part of its direct case at the outset, not non-record materials submitted only for convenience.

As to these documents, the Commission faces a choice. It can enforce its rules by refusing to allow the Postal Service to provide missing evidentiary support, via the belated "supplemental" testimony of Mr. McGrane, for its direct case in the midst of hearings on that very presentation. Or, it may tolerate the violation of its rules by allowing the Postal Service to introduce – far into the statutory 10 month review period allotted the Commission by law – "supplemental" testimony that belatedly seeks to provide a record evidentiary status for these documents.

As to LR-H-109 and LR-H-182 and the supplemental testimony of Mr. McGrane, NAA believes that enforcing the Commission's rules is the only appropriate course and is the most sound administrative practice. These materials were not properly filed as part of the Postal Service's direct case. While the Presiding Officer has expressed some concern over the state of the evidentiary record if unsponsored library references containing factual data are not considered, no such concern applies to LR-H-109 and LR-H-182. As those two references are relied upon to support *changes* from current costing and rate design practices, the consequence of not allowing them only now to become record evidence is simply that the Commission could not consider them in deciding to recommend a change from the *status quo* as to the proposals to which they pertain.

The alternative of allowing the Postal Service to provide a belated sponsor for these new materials is much less desirable.<sup>4</sup> This unfortunate practice (1) is not

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<sup>4</sup> NAA is aware, of course, that the Postal Service has been allowed to file, subject  
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consistent with the agency's procedural rules; (2) harms the integrity of the Commission's processes by making the Postal Service's case a moving target, thereby making these proceedings less efficient and its task more difficult; and (3) would only encourage future violations by the Postal Service. This is inconsistent with sound administrative practice. Whatever the Commission may decide as to the record status of routine Postal Service data filed as unsponsored library references – a matter as to which NAA states no position – these new analyses stand much differently. These latter materials should have been included in the Postal Service's direct case at the outset.

For these reasons, the Newspaper Association of America objects to the admission into the record of the material previously filed as Library References 109 and 182, and requests that they and the supplemental testimony of witness McGrane not be allowed into the record. Consistent with the above, the portions of the testimony of

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to objection, supplemental testimony as to LR-H-112 as well as LR-H-109 and LR-H-182, and that the Postal Service has indicated that more such supplemental testimony may come.

witnesses Daniel and Moeller which rely upon these documents to support changes in costing or rates should be struck as well.

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I hereby certify that I have this date served the instant document on all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

October 16, 1997

William B. Baker  
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